

FY 98/99.5

BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL

IN RE:)
)
 by his)
parents)
)
)
 vs.)
)
 STATE SCHOOLS FOR SEVERELY)
 HANDICAPPED)

COVER SHEET OF PERSONALLY IDENTIFIABLE INFORMATION

The parties to this hearing are:

Student
 DOB: _____
 Address: _____
 Homebound through Maple Valley State School
 Mr. Father
 Mrs. Mother

State Schools for the Severely Handicapped
 c/o Mr. Dewayne Cossey, Superintendent of Schools
 205 Jefferson Street
 Jefferson City, MO 65101-0480

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 5775 N.W. 64th Terrace
 Kansas City, MO 64151
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 Jefferson City, MO 65102
 Attorney for Respondent

BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL

IN RE:)

) and his
)
parents,)
) and)

vs.)

) STATE SCHOOLS FOR SEVERELY
) HANDICAPPED)ISSUES AND PURPOSE OF THE HEARING

1. Whether the Three-Member Due Process Hearing Panel has jurisdiction to hear a complaint under Section 504 of the Rehabilitation Act of 1973?

2. Whether _____ is being denied a free appropriate public education ("FAPE") in violation of IDEA by the State Schools' declining to authorize his homebound instructor to administer medications to him?

3. Whether the State of Missouri can mandate that a parent or other qualified adult be present in the student's home while homebound educational services are administered?

TIME-LINE INFORMATION

The request for hearing was received by the Department of Education on June 29, 1998. On August 5, 1998, the Chairperson received a "Joint Motion for Continuance" from the parties.

requesting that the matter be continued until September 21, 1998 for the submission of the case on a stipulation of facts and further, that the Hearing Panel's consideration of this matter be extended until October 5, 1998 for entry of the decision. The motion was granted. On September 21, 1998, the Chairperson received a Stipulation of Facts, including joint exhibits 1-10, signed by Thomas D. Munro and Edwin H. Steinmann, Jr., attorneys for the parties. The parties submitted trial briefs which were received on September 22, 1998, and this matter was taken under submission by the Hearing Panel.

FINDINGS OF FACT

1. _____ was born on _____. He is a child with severe disabilities who receives special educational services under IDEA and state law. He resides with his parents, _____ and _____ at _____ in the Kearney R-1 School District.¹

2. does not attend the Kearney R-1 School District but instead receives special educational services from the

Exhibit 1, S430; Exhibit 3, S609. On August 12, 1998, counsel for Respondent provided counsel for Complainants approximately 1000 pages of school records. These were numbered S1, S2, etc., the S designating State Schools for Severely Handicapped. Subsequently, counsel for Complainants added additional documents and continued with the same numbering system.

Department through the Maple Valley State School for Severely Handicapped in the form of homebound services. A homebound instructor provides thirty hours of special educational services for each week in the residence, in addition to which the related services of physical therapy, occupational therapy and speech therapy are also provided.²

3. began receiving special education services at the Maple Valley State School, located in Kansas City, in the school building as a day student, in 1993. On March 4, 1997, neurologist recommended homebound educational services, giving the reasons: "(1) seizure control has deteriorated; (2) medicinal changes have rendered him lethargic and (3) with the seizures there is increased risk of head injury."³ On April 2, 1997, Individualized Education Program ("IEP") team recommended homebound services, which were subsequently commenced.⁴

4. During an IEP conference held on May 6, 1998, Mrs. requested that the homebound instructor administer medications to when providing instruction.⁵ The State Schools staff did not agree with this request, and it was not granted by the IEP

² Exhibit 10, S-1234.

³ Exhibit 3, S419.

⁴ Exhibit 2, S430, S447.

⁵ Exhibit 3 (Attachment A), S591.

team. Subsequently, the matter was referred to the superintendent of the State Schools, Dewayne Cossey, for his review.⁶ By letter dated May 20, 1998, Mr. Cossey upheld the IEP team determination and denied the request that the homebound instructor administer medication.⁷

5. A Resolution Conference, under § 162.961, RSMo Cum. Supp. 1997, was held on June 8, 1998, before Steve Dodge, Director for Instruction for the State Schools. In his Resolution Conference decision, Mr. Dodge identified two issues raised by the "(1) their desire that the homebound instruction aide be allowed to administer medications to during the time she is providing instruction in the home; and (2) that if she is permitted to do so, there is no requirement or need for an adult family member or personal care attendant to be present in the home."⁸ Mr. Dodge ruled against the on both issues.⁹

6. has a mid-brain tumor in the hypothalamus region, which region controls hormonal processes, moods, motivational states, sexual maturation and body temperature. He receives medication for hyperactivity, seizures and sleep. Side effects

⁶ Exhibit 3 (Attachment A), S591.

⁷ Exhibit 3 (Attachment D), S956-958.

⁸ Exhibit 3, S610.

⁹ Exhibit 3, S614.

include fatigue, unsteadiness, limpness, hyperactivity, loss of appetite and blood pressure fluctuation. He also receives monthly injections to stop puberty development. He experiences seizures, and a seizure protocol is in place.¹⁰

7. maintains attention inconsistently. Frequent prompts are required for him to begin a task, and he inconsistently completes instructional tasks. He may refuse to comply with instructional requests or directions. He may pinch, hit, bite, turn over chairs and throw what is on desks or tables near him. He resists going into places that are unfamiliar to him. has limited interactions with peers, but has recently been displaying a preference for spending time with family members. When around a cooking area, the sound of a microwave and time on the stove are annoying to . When hearing these sounds, he becomes aggressive (throwing chairs, etc.) He does not exhibit functional safety skills such as distinguishing the difference between hot and cold, crossing the street safely and awareness of danger around railings.¹¹

8. The first Goal listed in IEP dated 5/20/98 is, "The student will increase self-regulation." This goal is followed

¹⁰ Exhibit 3 (Attachment A), S582; Exhibit 5, S562.

¹¹ Exhibit 3 (Attachment A), S582.

by the Objective, "Student will increase self-regulation by not displaying emotional outbursts."¹²

9.)Seizure Protocol provides, in part: "Type 3 is a DROP seizure - ,may lunge forward while sitting with his full upper body. This type of seizure may occur while standing with no prior warning that it's coming. If standing will forcefully fall to the floor and hit anything in his path. These types of seizures can cause serious injury. If injured seek medical attention, if necessary call 911. Otherwise, may want to rest for a few minutes after this type of seizure." The Protocol also provides: "If a seizure were to last more than 10 minutes, seeks [sic] immediate medical attention, call 911."¹³

10.)homebound instructor, Gail Summers, received training as a personal care attendant or assistant through Platte County Health Services and possesses a Level 1 authorization to administer some medications. She is Medication Technician 1. On some occasions, Summers has served as personal care attendant and has administered medications to him.¹⁴ These are Department of Mental Health certifications for use in DMH programs (and not applicable to DESE programs):

¹² Exhibit 3 (Attachment A), S583.

¹³ Exhibit 5, S562.

¹⁴ Exhibit 4, S959, S962, S964, S967.

11. Typically at Maple Valley, the teaching staff does not administer medication. Robin Mustich, principal of Maple Valley, explained at the resolution conference, "At school we have a nurse that's trained to administer medications and she administers all medications and does all special health care procedures unless she's absent in which case I am the next in line trained to do that. If I am absent, the next person in line is my back up person and she's trained to do that. Typically, those are the only three people at Maple Valley who administer medications."¹⁵

12. Mrs. motivation in pursuing the issue of the homebound instructor being required to administer medication is being able to leave the home during the day to attend to other matters. She stated at the resolution conference: "What if I have an emergency with my other son, or he needs to be ran somewhere or I need to go somewhere, I used to be able to do all those things when was at school. I cannot do those any longer during the day time. Like most people are allow[ed] to do."¹⁶; "I didn't want to have to say to you that I will be here from 10:30 to 5:00 Monday through Friday always because then if I ran down to the store

¹⁵ Exhibit 4, S962.

¹⁶ Exhibit 4, S964.

because I ran out of juice or I had to run to Wal-Mart because we ran out of medicine or whatever the case may be."¹⁷

13. A State Schools document entitled "Health Guidelines and Procedures" provides, in part:

D. Emergency Medication Administration on Bus
Any student requiring emergency PRN medication must have a Special Health Care Procedure form (7-760-541) filled out by the physician with child specific orders regarding the administration of the medication. The medication must be in the original pharmacy container properly labeled and kept in a locked box/container on the bus. The bus driver and attendant [sic] the proper administration of the drug and instructed of possible side effects to be aware of. If the student does not improve and the situation becomes life threatening, the driver will drive to the nearest phone and call the ambulance while the bus attendant cares for the student. CPR/First Aide will be administered if needed until the ambulance attendants arrive [sic] take over. Parent/guardian will be notified as soon as possible of the emergency."¹⁸

This procedure refers only to the emergency administration of Valium on a school bus when a child is having a seizure--not to the routine administration of medication."¹⁹

14. The Director of Special Education for the Kearney R-1 School District, Nancy Woolsey, is not aware of any instances in

¹⁷ Exhibit 4, S966-67.

¹⁸ Exhibit 3 (Attachment C), S954-55.

¹⁹ Exhibit 4, S962.

which the homebound teacher is providing medication. At the resolution conference, she stated: "We don't have any instances where the homebound teacher is providing medication. None."²⁰; "For the district students who are homebound primarily for a health condition, the medication is administered by someone in the home and a parent is present during homebound services."²¹

15. The believe that the State Schools are required, under IDEA, to authorize the homebound instructor to administer medications to , because they view the administration of medication as a necessary related service. Mr. has stated: "We can't find, we don't understand why it's interpreted that it's not a necessary related service. . . . I'm not sure what separates why this wouldn't be considered a necessary related service under health services just because it's homebound versus the school."²² Further, "And here's an article in a Cedar Rapids School District, the Court held that one-on-one nursing care needed by the student was the responsibility of the district under IDEA. An[d] unless that service had to be provided by a physician it is interpreted to be a related service and not an excludable medical service. Now

²⁰ Exhibit 4, S972.

²¹ Exhibit 4, S972.

²² Exhibit 4, S960.

again, no distinction's ever made anywhere that we can find between homebound versus the school."²³

16. The Superintendent of the State Schools, Dewayne Cossey, does not believe that administration of medication to by the homebound instructor is a necessary related service. He has stated: "Administration of medications is a related service under regulations implementing the Individuals with Disabilities Education Act (IDEA). Such related service is required when such is necessary to enable a student to attend and meaningfully participate in the education program provided in the school building. does not attend school and receives his entire educational program through homebound services. The position of the State Schools for Severely Handicapped is that an adult family member or personal care attendant, other than the person providing the homebound instruction, be present at all times the instruction is occurring as the homebound instructor is provided only for that purpose. Therefore, the IEP team does not believe administration of medication is a necessary related service as the adult family member or personal care attendant is present to administer medication during the time homebound instruction is provided."²⁴

²³ Exhibit 4, S961.

²⁴ Exhibit 3 (Attachment D), S956.

17. Mr. Cossey has also stated: "It is my belief and understanding, as I read the implementing regulations, that the Individuals with Disabilities Act (IDEA) does not require the State School for Severely Handicapped to assume sole responsibility of caring for and administering medications to a student who is on homebound placement and that doing such would not be in the best interest of the student or the person providing the homebound instruction."²⁵

18. The principal of Maple Valley, Robin Mustion, has served on IEP committee since his enrollment in 1993. She has expressed the reasons why she could not agree at IEP conference on May 6, 1998, to the homebound instructor's being required to administer medication: "If [redacted] fell during a seizure and seriously injured himself the assistance of another individual could be vital to his well being. . . . He is of large stature for his age and two people would be needed to move him safely during a seizure or the postictal period. . . . If this individual [homebound instructor] developed a serious health problem or suddenly became ill, both [redacted] and the instructor/aide's safety could be compromised. In this circumstances there would be no one available to contact paramedics, administer first aid, or care for [redacted]. It would not be appropriate for the

²⁵ Exhibit 9, S-1232.

instructor/aide to handle circumstances that could arise in the home. For example, if a power outage occurred the instructor/aide might have difficulty supervising while locating and correcting the problem. Mechanical problems could arise with the heating and cooling systems in the home. A water leak or appliance could pose similar problems. If these problems occurred it would be very difficult for the instructor/aide to continue providing instruction and supervision to while trying to deal with such basic household situations. The instructor/aide is in the home for the purpose of providing instruction to There is also a risk that damage or misplacement of personal property could occur and that absence of a family member or care attendant could raise a liability question or issue. . . . There is the possibility of the instructor/aide being accused of mistreating or injuring the student if they are alone in the home. This would leave the homebound instructor/aide in an inequitable situation as there would not be a witness to substantiate the circumstances.²⁶

CONCLUSIONS OF LAW AND DECISION

19. The first issue to be decided by the Panel is whether or not it has jurisdiction to hear a complaint that Section 504 of the Rehabilitation Act of 1973 has been violated. Petitioners in their

²⁶ Exhibit 10, S-1234-35.

brief claim that Respondent has been guilty of disparate treatment towards in violation of § 504 and claim further that the Panel must consider the application of § 504. This Panel is convoked pursuant to the State's Plan for Part B of "IDEA," 20, U.S.C. § 1400, *et seq.*, and § 162.961 RSMo (Cum. Supp. 1997) to hear and decide cases concerning children with disabilities as therein described. This Panel has no authority to hear complaints under § 504 of the Rehabilitation Act.

20. The next issue which the Panel takes up is whether is being denied a free appropriate education ("FAPE") in violation of IDEA by the State Schools' declining to authorize his homebound instructor to administer medications to him?

21. This is a case of first impression. Neither party has cited the Panel to any case which has decided this issue. Independent research by the Chairperson has not found a case which deals with this issue. In deciding this issue, therefore, the Hearing Panel must draw inferences from relevant sections of IDEA, the regulations promulgated pursuant to the statute, and the following cases: Irving Ind. School Dist. v. Tatro, 104 S.Ct. 3371 (1984) and Cedar Rapids Community School Dist. v. Garret, 106 F.3d 822 (8th Cir. 1997). The pertinent sections of IDEA, 20 U.S.C. § 1400 *et seq.* provide as follows:

20 U.S.C. §1401(8) defines free appropriate public education as follows:

The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Section 1401(25) defines "special education" as follows:

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1401(22) defines "related services" as follows:

The term "related services" means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

The federal regulations which have been promulgated by the Congress pursuant to IDEA include school health services as "related services." 34 C.F.R. § 300.16(11) describes "school health services" as "services provided by a qualified school nurse or other qualified person."

22. Both parties have cited Cedar Rapids Community School District v. Garret, 106 F.3d 822 (8th Cir. 1997) in support of their respective positions. That case involved a severely disabled student who was a quadriplegic and ventilator dependent who required a personal attendant at all times to see to his health care needs. His parents requested that the school district provide his nursing services while he was at school. The school district refused stating that it was not obligated to provide continuous, one-on-one nursing services. After the case had been heard administratively and appealed to the United States District Court and the Eighth Circuit Court of Appeals, the Eighth Circuit ruled in favor of the parents. In doing so, the Eighth Circuit reviewed the definitions of "free appropriate public education" and "related services" as set forth in IDEA. The court ruled that the nursing services qualified as related services and not as excludable "medical services." In so ruling, the Eighth Circuit was guided by the decision of the United States Supreme Court in Irving Ind. School Dist. v. Tatro, 104 S.Ct. 3371 (1984). The Eighth Circuit

utilized the Tatro court's analysis in determining whether a service is a related service under IDEA. The Eighth Circuit stated as follows:

"To determine if a service is a related service under the IDEA, the court must first determine whether the service is a 'supportive service' [] . . . required to assist a child with a disability to benefit from special education." (citations omitted) If it is, then the court must determine if the service is excluded from the definition of supportive service as a medical service beyond diagnosis or evaluation. (citing Tatro)" Cedar Rapids Community School District v. Garret, 106 F.3d at 824.

The Eighth Circuit ruled that the services required by Garret qualified as supportive services because he could not have attended school and thereby benefit from special education without them. The court cited a portion of the Supreme Court's opinion in Tatro in reaching its conclusion. "Services . . . that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the building. . . ." 106 F.3d at 825.

23. In Irving Ind. School Dist. v. Tatro, action was brought to require the school to provide an 8-year-old child born with spina bifida with clean intermittent catheterization so that she could attend special education classes. The Supreme Court held that provision for clean intermittent catheterization was a "related service" and not a "medical service."

24. Significantly, neither Garret nor Tatro involved homebound instruction. Moreover, the courts clearly held that the "related services" therein described were necessary so that the student could remain at school in order to receive special education services. That is not the case here. Hence, the medicines which his parents request should be administered by the homebound teacher aide is not a necessary service in order to allow to remain in school. The Panel has been cited to no authority, nor has independent research uncovered any, which requires the school to administer medicines in the home of the student so that the parents are free to be away from home, or for any other reason. Mr. and Mrs. , as the parents of have the responsibility, generally, to see to it that receives necessary and appropriate health related services, including the administering of medicines. Obviously, they are at a disadvantage to do so if "were at school, and as Tatro and Garret instruct us, the administering of such medicines as can be given by a school nurse or other qualified person would be a "related service" and not a "medical service." They are not at such disadvantage when is within their own home. Therefore, the Panel rules that the Respondent is not obligated to administer medicines to while is in his home receiving homebound instruction.

25. Mr. and Mrs. argue that the State is requiring them to participate in education by either being at home, themselves, or providing an attendant to administer the medicines. This argument is misplaced. Their presence, either in person or through an attendant, is to foster health, not to administer educational services. The fact that the teacher's aide is qualified and in fact has administered medicines to him in her capacity as a health care attendant, does not impose a duty on the State since it is not necessary to administer the medicines so that can remain at school. Mr. and Mrs. have a duty to see to it that their son receives his medications at home. That duty is not relinquished to the school simply because a homebound teacher's aide is providing educational services in the home. Mr. and Mrs. argue that the failure to administer medicines to at home establishes disparate treatment between those disabled students who receive medicines from school employees while at school or in emergencies on a school bus but not while at home during homebound instruction. The Panel has not been directed to any section of IDEA which requires the State to provide similar treatment in this instance. Illegal disparate treatment usually concerns comparison between a protected class and a non-protected class. Here, there is no involvement with a non-protected class. Moreover, the comparison to emergency services on a bus is inapposite. The also argue that the consequences of

mandating the parents either to pay a full-time aide to be present at home during instruction or be present themselves, denies them the opportunity to support themselves. The Panel cannot consider such an argument. We have been convoked to hear charges of the violation of IDEA. That is our sole jurisdiction. The make other arguments in their brief. Suffice it to say that the Panel has not been persuaded that any of these arguments require that the Respondent administer medicines as a "related service" to during homebound instruction.

26. Petitioners also raise an issue as to "whether the State of Missouri can mandate that a parent or other qualified adult, at the expense of the parent, be required to be present in the child's home while mandated educational services ordered by an Individual Education Plan are being provided." (Petitioners' Brief, p. 1 "Issues") As previously stated, the Panel's authority is limited to the application and interpretation of IDEA and the rights and duties created by it. The Panel rules that nothing in IDEA addresses the issue raised by the Petitioners. If Petitioners choose not to have a qualified adult present in their home while educational services are being provided by Respondent, or, alternatively, if neither of the parents decides to be in the home at that time, there is nothing provided by IDEA which covers the situation. The Panel does not believe that it has jurisdiction to

determine whether or not Respondent might be in violation of some other duty imposed by law.

Accordingly, it is the decision and order of the Three Member Due Process Panel that:

1. The Panel does not have jurisdiction to consider a complaint under Section 504 of the Rehabilitation Act of 1973;
2. The Respondent (State Schools for Severely Handicapped) has no duty to administer medicines to him while is receiving homebound instruction; and
3. The Panel does not have jurisdiction to determine whether the Respondent can mandate that a parent or other qualified adult be present in the student's home while homebound educational services are administered.
4. Petitioners' petition is dismissed with prejudice.

APPEAL PROCEDURE

PLEASE TAKE NOTICE THAT THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION CONSTITUTE THE FINAL DECISION OF THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION IN THIS MATTER.

PLEASE TAKE FURTHER NOTICE that you have a right to request review of this decision pursuant to the Missouri Administrative Procedure Act, Section 536.010 et seq. RSMo., specifically, Section 536.110 RSMo. which provides in pertinent part as follows:

- "1. Proceedings for review may be instituted by filing a petition in the Circuit Court of the

county of proper venue within 30 days after the mailing or delivery of the notice of the agency's final decision . . .

3. The venue of such cases shall, at the option of the plaintiff, be in the Circuit Court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence . . .

PLEASE TAKE FURTHER NOTICE that, alternatively, your appeal may be taken to the United States District Court for the Western District of Missouri in lieu of appeal to the state courts. 20 U.S.C. § 1415.

Entered this 1st day of October, 1998.

George J. Bude
GEORGE J. BUDE, Chairperson

Barbara Welsh
BARBARA WELSH, Panel Member

RAND HODGSON, Panel Member

Copies of the foregoing
mailed to:

Mr. Thomas Munro
Mr. Edwin Steinmann, Jr.

Dissenting opinion

I agreed with the panel on issue # one and # three. However, the major and underlying issue for this panel to consider is issue # two, dealing with F.A.P.E., that the school would not administer medications at the homebound placement. In considering this you have to identify and question three distinctive points to come to a decision.

1. Did the I.E.P. team decide that the appropriate placement for Mr. [redacted] was Home bound?
2. Is the administering of the medication to Mr. [redacted] considered a related Service?
3. Is the homebound placement considered school and is there a difference of Responsibilities for the L.E.A. under I.D.E.A.?

The first question addresses whether the team made an informed and appropriate decision for homebound placement. The evidence clearly shows this to be yes and the I.E.P. team agreed to the most appropriate placement.

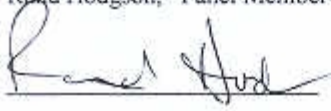
The second question deals with the medication being administered by the qualified school personnel as a related service. Utilizing the Tatro courts decision and applying the same standard, there would be no question that this is a related service for Mr. [redacted]. Since he couldn't function at school without daily medications. As for the teachers' aide, the aide is qualified and has performed this in the past, as shown by the evidence.

The third question is by far the most concerning. If a placement decision is made for a student, whether it be in the local school, alternative school, private placement or homebound. Do the related services change and is the school defined as a physical plant or is it where an I.E.P. is implemented? Dealing with the second part of the question first. After an avid search the panel members could not come up with a case law for dealing with the physical plant of school. I believe that the school can be a variety of settings and physical locations, depending upon what is most appropriate for the child. It would not be defined as one and only one physical plant. I can't believe that the related services could change no matter where this placement is deemed to be. So, in this case, I would conclude that homebound is the school for Mr. [redacted] and the responsibilities for the L.E.A are the same.

I do not see that the parents have more or less responsibilities no matter where the placement would be. Placement should be a complete separate issue determined by the I.E.P. team for where F.A.P.E can be provided. It is my conclusion that

F.A.P.E. can not be provided if the related services are changed or not provided. So with this reasoning, I would have to dissent from the panel.

Rand Hodgson, Panel Member

A handwritten signature in dark ink, appearing to read "Rand Hodgson", written over a horizontal line.